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No. 02-658

Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF NORTH DAKOTA, WYOMING, ALABAMA, DELAWARE, IOWA, MONTANA, NEBRASKA, NEVADA, SOUTH DAKOTA, AND UTAH IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE*

The States of North Dakota, Wyoming, Alabama, Delaware, Iowa, Montana, Nebraska, Nevada, South Dakota, and Utah, as *amici curiae* ("*Amici* States"), respectfully submit this brief in support of the Petition for a Writ of Certiorari filed by the State of Alaska. *Amici* States oppose the decision below of the United States Court of Appeals for the Ninth Circuit, which skews the federal-state partnership envisioned by Congress under the Clean Air Act (the "Act"), 42 U.S.C. §§ 7401, *et seq.*, in general and, in particular, under the Act's Prevention of Significant Deterioration ("PSD") provisions, *id.*, §§ 7470-7479. *Amici* States urge this Court to grant Alaska's petition in order to correct the imbalance wrought by the Ninth Circuit's decision.

INTEREST OF *AMICI CURIAE*

Protection of public health and the environment is of manifest importance to all States. Air pollution affects health and quality of life, and it has both near-to-source and long-range impacts on the environment. As a result, *Amici* States fully support the goals and policies that underlie and are embodied in the Act. At the same time, *Amici* States have an important interest in ensuring that the Act is construed in a way that protects the social and economic well being of their citizens, as well as their public health and welfare.

The Act recognizes and respects the tension that can arise between environmental protection and social and economic impacts on a community. Congress expressly reserved to the States the role of balancing those

competing concerns under the Act's PSD provisions, which apply in "clean air" areas of the country. The Act requires new sources of pollutant emissions to use Best Available Control Technology ("BACT") in areas where air quality is already better than the National Ambient Air Quality Standards (the "NAAQS"). In the statutory definition of BACT, Congress provided that the States must exercise their discretion to decide what constitutes BACT for a particular source. 42 U.S.C. § 7479(3). Nowhere in the language or the structure of the Act, or in its legislative history, did Congress state or imply that State BACT determinations are merely preliminary. Yet the Ninth Circuit erroneously held that such BACT decisions are only "initial," and that they are subject to EPA's "ultimate" authority to disagree and override States' determinations. App. at 10a-11a. *Amici* States have a compelling interest in protecting their authority under the Act, including fulfilling their primary role of weighing the statutory BACT factors in implementing their respective PSD programs. The Ninth Circuit's decision strips the State of Alaska of that role, and *Amici* States fear that EPA will attempt to wrest from them, too, their responsibility for BACT determinations, relegating state environmental agencies to the role of EPA branch offices.

Amici States also have an interest in promoting the orderly function of their respective administrative decision-making processes under the PSD program and generally under the Act. Beyond their common interest in making correct decisions under their PSD programs, they also care about the wise and efficient use of state resources dedicated to those programs. When Congress granted EPA authority to issue enforcement orders for violations of "requirements" of a State Implementation

Plan ("SIP") or the Act's PSD provisions, 42 U.S.C. §§ 7413(a)(5), 7477, it did not intend EPA to use that limited authority as a substitute for participation in and respect for the State's PSD permitting process. Yet, in this case EPA declined to challenge Alaska's BACT determination at the state administrative level, thereby denying Alaska the chance to develop a complete administrative record in support of its BACT decision, and instead presented the BACT question to a federal court of appeals on an incompletely-developed state administrative record. *Amici* States have a strong interest in avoiding this emasculation of their administrative process and waste of state resources in future PSD permitting proceedings.

For these reasons, *Amici* States file this brief in support of the State of Alaska's petition.

REASONS FOR GRANTING THE PETITION

I. Congress Expressly Reserved To The States Specific Authority Under The Clean Air Act

In the Act, Congress assigned distinct roles to the federal and state governments. A key federal role is the promulgation of the NAAQS, which define the amount of pollutants that may be emitted in a given area without harming public health and welfare. 42 U.S.C. § 7409. Despite EPA's responsibility for setting the NAAQS, which apply nationally, the Act makes clear that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Thus, the States, through their approved SIPs, are charged with implementation of the

federally-set NAAQS. *Id.* § 7410. As this Court has recognized, "Congress plainly left with the States, so long as the [NAAQS] were met, the power to determine which sources would be burdened by regulation and to what extent." *Union Elec. Co. v. E.P.A.*, 427 U.S. 246, 269 (1976); *see also Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975).

Congress also gave the federal and state governments distinct functions in the implementation of the Act's PSD program. EPA sets the allowable increments that may be consumed for a particular regulated pollutant. 42 U.S.C. § 7476(a). The States, meanwhile, determine the areas in which the increments will apply, and provide for non-exceedence of the increments through their SIPs. *Id.* § 7474(a); 40 C.F.R. § 51.166(a) (1999). EPA "is without authority to dictate to the States their policy for management of the consumption of allowable [PSD] increments." *Alabama Power Co. v. Costle*, 636 F.2d 323, 361 (D.C. Cir. 1980). Rather, "assuming compliance" with the maximum limitations defined by EPA through the increments, "growth-management decisions were left by Congress for resolution by the states." *Id.* at 364.

When Congress gave the States responsibility for managing the PSD increments, it acted consistently with EPA's own earlier judgment that implementing the PSD program is uniquely local in nature:

> Any policy to prevent significant deterioration involves difficult questions regarding how the land in any area is to be used. Traditionally, these land use decisions have been considered the prerogative of local and State governments, and . . . the primary opportunity of making these

> decisions is reserved for the States and local governments. . . . In the Administrator's judgment, this matter should not be handled at the Federal level,. . . .

39 Fed. Reg. 31000, 31001 (1974). Almost twenty years later, EPA confirmed its perception of the States' ultimate responsibility to implement the PSD program:

> [I]t is the state that must make the final decision on all issues relating to the specific [PSD] permit. There is no suggestion in the Act's NSR [New Source Review] provisions that EPA has authority to second-guess the state on matters that are a lawful and rational exercise of discretion properly conferred upon the state. . . .

EPA OFFICE OF GEN. COUNSEL ["OGC"] LEGAL OP., *EPA Enforcement Authority with Respect to Sources Based on a Finding of a State's Failure to Comply with New Source Requirements*, at 2 (Jan. 22, 1993), AS App. at 3.[1]

Not surprisingly in light of the Act's allocation to state and local governments of responsibility for "air pollution prevention . . . and air pollution control at its source," 42 U.S.C. § 7401(a)(3), Congress also charged those States with EPA-approved SIPs with responsibility for BACT determinations. The Act defines BACT as "an emission limitation . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental,

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[1] Citations to "AS App." refer to *Amici* States' appendix, which is bound with this brief. Citations to "App." refer to the appendix that accompanied the petition in this docket.

and economic impacts and other costs, determines is achievable for such facility. . ." 42 U.S.C. § 7479(3); *see also* 40 C.F.R. § 51.166(b)(12) (1999).[2]

Beyond making clear that States – not EPA – would select BACT, the Act's BACT definition confirms that the determination is a discretionary one, based on the statutory factors. 42 U.S.C. § 7479(3). While the Act defines the factors that States must consider, the ultimate selection of BACT is a judgment call by the States, and there is no one "correct" BACT for a given source. As stated best by EPA itself, "the state remains free to exercise informed judgment in making the determinations" required for PSD permits, including the selection of BACT. OGC LEGAL OP. at 2, AS App. at 4. "[I]f a state has met all procedural norms, considered all available control technologies, and given a reasoned justification of the basis for its [BACT] decision, EPA has no grounds on which to challenge a final substantive state decision that does not violate such objective standards." *Id.* at 5. That is precisely what Congress was thinking when it enacted the PSD provisions: "The decision regarding the actual implementation of best available technology is a key one, and the [Act] places this responsibility with the State, to be determined in a case-by-case judgment." S. REP. NO. 127, 95th Cong., 1st Sess. 31 (1977). Moreover, "the phrase [BACT] has broad flexibility in how it should and can be interpreted, depending on site." *Id.*

[2] States with approved SIPs are the "permitting authorit[ies]" under 42 U.S.C. § 7479(3).

Thus, the plain language of the statute, its legislative history, decisions of this Court and lower federal courts, and EPA's own interpretations of the PSD provisions confirm beyond doubt that States must determine BACT for a particular source, and must exercise discretion in that process. As is true with implementing the NAAQS and other authority under the Act that Congress expressly reserved to the States, EPA lacks the power to question the wisdom of a State's BACT determination, so long as that State determination protects the federally-set increments and was made based on the statutory factors and the state's EPA-approved SIP.

II. EPA May Not Usurp Reserved State Authority Through Enforcement Orders

Here, the State of Alaska exercised its authority to determine BACT in accordance with the Act. Alaska considered a variety of possible technologies in light of the statutory factors listed in 42 U.S.C. § 7479(3); it engaged in a lengthy dialogue with the permit applicant, EPA, and other interested parties; it independently researched the pros and cons of the many potentially available technologies; it prepared preliminary, draft, and final technical analysis reports; and it ultimately selected a technology known as "Low NOx" as BACT.

Where did Alaska go wrong? Stated plainly, it selected a technology different from the one that EPA favored – selective catalytic reduction or "SCR." EPA, offended by Alaska's failure to march in step, responded by issuing a series of enforcement orders under Sections 113(a)(5) and 167 of the Act. Section 113(a)(5) permits EPA to issue

orders prohibiting the construction of new sources or the modification of existing sources when the EPA Administrator "finds that a State is not acting in compliance with any requirement or prohibition of the Act" relating to such construction or modification. 42 U.S.C. § 7413(a)(5)(A). Section 167 permits orders "as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements" of the PSD provisions. *Id.* § 7477.

EPA asserted, and the Ninth Circuit accepted, that the Act's enforcement provisions in 42 U.S.C. § 7413(a)(5)(A) and § 7477 vest EPA with broad authority to use enforcement orders to override a State's selection of BACT whenever EPA disagrees with the State's "improper determination." App. at 10a. The Ninth Circuit reasoned as follows: (a) Subjecting a facility to BACT is a "requirement" of the Act and its PSD sub-part, *id.* at 8a; (b) when EPA disagreed with Alaska's choice of Low NOx as BACT, it concluded that Alaska "had not complied with the BACT requirement," *id.* at 9a; and (3) *ergo*, EPA could invoke its enforcement powers to override the Alaska decision, *id.* at 10a-11a. On this basis, the Ninth Circuit held that Alaska "made the initial BACT decision," *id.* at 9a, but "EPA has the ultimate authority" to determine BACT, *id.* at 10a-11a.

The Ninth Circuit's logic, however, is overly simplistic and fatally flawed. It assumes that the "requirement" of the Act, for purposes of 42 U.S.C. § 7413(a)(5)(A) and § 7477, is the choice of one particular technology as BACT, when, in fact, the Act requires only that a State undertake a BACT analysis and select the technology that the State deems appropriate in light of the statutory factors (and one that protects the increment). The State's chosen

technology might or might not coincide with EPA's choice of BACT, if EPA were the decision-maker. The point, however, is that EPA is *not* the decision-maker under 42 U.S.C. § 7479(3). The Ninth Circuit essentially ignored that section, which, by defining BACT as a discretionary State judgment, necessarily defines what the BACT "requirement" is under the Act. Yet, the Ninth Circuit inexplicably concluded that "[n]othing in the BACT definition of 42 U.S.C. § 7479(3) limits the EPA's authority." App. at 11a.

The Ninth Circuit held that "[t]he structure and legislative history of the Act" further support the court's endorsement of a radical shift in power from the States to EPA App. 9a. The court reviewed various amendments to the Act since its original enactment in 1963, concluding that "[f]ollowing disappointing state response to air pollution concerns, Congress has consistently increased over time federal authority in pollution control." *Id. Amici* States do not dispute the legislative events that the decision below summarizes; they do, however, challenge the relevance of those events to the issue here, *i.e.*, whether EPA may use enforcement orders to divest States of the discretion that Congress vested in them to make BACT determinations.

For example, the fact that in 1970 Congress directed EPA to publish NAAQS and directed the States to develop SIPs to meet the NAAQS, *see id.*, has no bearing on the then-non-existent PSD program; the federal concern in 1970 over "dirty air" areas was distinct from the later focus of the PSD program on preserving "clean air" areas. Moreover, as discussed *supra* at pp. 3-4, but ignored by the Ninth Circuit Congress expressly allocated authority to implement the NAAQS to the States. Similarly, the

"internal industry 'pressure'" referred to by the Ninth Circuit as one basis for Congress's adoption of the PSD provisions in 1977, App. 10a (quoting legislative history), resulted in federally-set maximum increments, but *not* federal control over the implementation of the PSD program; rather, Congress specifically gave that responsibility to the States. *See supra* at p. 4.

Missing from the Ninth Circuit's analysis of the Act's historical development are the most important points of all – acknowledgments that (a) in 1977 Congress unambiguously gave the States the primary authority to implement the PSD program, including BACT determinations, and (b) Congress has not reduced that authority since 1977. Indeed, EPA concluded in 1993 – *after* the legislative events on which the Ninth Circuit relies for its anti-state-authority premise – that "[t]here is no suggestion . . . that EPA has authority to second-guess the state on matters that are a lawful and rational exercise of discretion properly conferred upon the state. . . ." OGC OP. at 2, AS App. 3.

Under the Ninth Circuit's decision, EPA is in complete control of a State's air program, both under the PSD provisions (to which Section 167 applies) and under a state's SIP in general (to which Section 113(a)(5) applies). No matter that Congress specifically allocated authority to the States – EPA's enforcement authority trumps that State authority. No matter that the particular issue calls for the exercise of discretion and that the Act does not require one objectively-definable outcome – if EPA disagrees with the State's subjective analysis, it may steamroll the State through the exercise of its "ultimate" enforcement authority.

III. The Ninth Circuit Decision Will Harm State Air Programs And Interests

Beyond its substantive deficiencies, the Ninth Circuit decision will have an enormous effect on all States, including the *Amici* States, as they attempt to implement their air programs. The essential holding of the Ninth Circuit decision is that the Act gives the States only "initial responsibility" for PSD permitting decisions, but that "EPA has the ultimate authority to decide" BACT. App. 10a-11a. This sweeping pronouncement, based on an unduly-broad construction of the word "requirement" in 42 U.S.C. § 7413(a)(5)(A) and § 7477 relegates state programs to mere preliminary involvement with no substantial decision-making power. State authority to determine BACT, and likely with respect to other discretionary decisions under the Act as well, is rendered a mere illusion.

The impact of this restriction on States' authority is obvious. *First*, permit applicants will be left with uncertainty whether and when EPA will choose to inject itself into the state permitting process, and whether they can participate in that process with confidence; that uncertainty, in turn, will frustrate growth, thereby depriving the States of control over the "growth management decisions" that Congress specifically "left . . . for resolution by the states." *Alabama Power*, 636 F.3d at 364. *Second*, applicants will see scant value in working meaningfully with the States on BACT and other determinations under the Act, because they will know that EPA will be the ultimate decision-maker. *Third*, the administrative process will be thrown into disarray: state administrative procedures for hearings on and review of permitting decisions will be rendered superfluous as

applicants work directly with EPA instead of through State air programs; and absent defined procedures, there will be no useful administrative records, which (as in this case) will make EPA's determinations virtually unreviewable.

Congress did not intend these results when it made permit-specific decisions the province of the States, so long as the States apply the statutory factors stated in 42 U.S.C. § 7479(3), follow the requirements incorporated into their federally enforceable SIP, and protect the increments from over-consumption. The Ninth Circuit's decision – its acceptance of EPA's effort to bootstrap a difference of opinion into a violation of law – turns the Clean Air Act on its head.

CONCLUSION

Because both the analysis and conclusion in the decision below are flawed, *Amici* States urge this Court to grant the State of Alaska's Petition for a Writ of *Certiorari* and to reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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January 2, 2003

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JAN 22 1993

OFFICE OF
GENERAL COUNCIL

MEMORANDUM

SUBJECT: EPA Enforcement Authority with Respect to Sources Based on a Finding of a State's Failure to Comply with New Source Requirements: The Effect of the 1990 Amendments
LEGAL OPINION

FROM: Raymond J. Luduiazanski
Acting General Counsel

TO: Scott Fulton
Acting Assistant Administrator for
Enforcement

ISSUE: Whether the 1990 Amendments to the Clean Air Act (CAA) section 113(a)(5) provide authority for EPA to take enforcement action against a source when EPA finds that a permit issued by a state does not comply with the new source review requirements to prevent significant deterioration (PSD) of air quality in attainment areas under Part C of Title I of the CIA?

ANSWER: Section 113(a)(5) as amended gives EPA authority to take enforcement action against a source with a state-issued permit that does not comply with PSD new source review requirements, and thus provides enforcement authority similar to that which already exists under that section with respect to state-issued permits that do not comply with new

source review (NSR) in attainment areas under Part D of Title I of the CAA.

DISCUSSION:

I. Introduction

The Clean Air Act (CAA), 42 USC § 7401 *et. seq.*, as amended in 1977, authorized civil enforcement action and administrative compliance orders with respect to major stationary sources based on a finding that a state "is not acting in compliance" with "any plan provisions" that require new sources to obtain a new source review (NSR) permit in nonattainment areas. Section 113(a)(5)-549, have revised and expanded this EPA authority. This memorandum is in response to a request from the Office of Enforcement for a legal opinion addressing whether the amended section provides authority to EPA to take enforcement action, based on a finding of state noncompliance, with respect to sources subject to new source-review requirements in *attainment* areas, as well as sources in *nonattainment* areas. The Office of Enforcement also seeks advice on whether the Amendments affect the proper parties to any enforcement action and the circumstances in which an action may be brought. The Office of Enforcement plans to issue revised enforcement guidelines with respect to its authority under this section which will identify the Agency position on the policy matters.

II. Background

There are two principal new source review programs under the Clean Air Act calling for the preconstruction review and permitting of major stationary sources and major modifications to existing sources of air pollution.

The nonattainment NSR requirements in Part D of Title I apply in areas designated as nonattainment under section 107 of the Act, while the prevention of significant deterioration (PSD) requirements under Part C apply in all other areas.[1]

As with all SIP programs – Congress envisioned that states would play the primary role in enforcing the nonattainment and PSD new source review programs. *See* sections 101(a)(1), 110(a)(2)(C), 161, and 172(b)(5) of the Act. However, it is also clear that Congress intended EPA to play an important oversight and enforcement role. This intent is manifest in the numerous and detailed federal enforcement provisions affecting NSR in sections 107 and especially 113 that are discussed below.

EPA follows two general principles in reconciling the tensions between the state and federal responsibilities in the administration of NSR programs. First, it is the state that must make the final decision on all issues relating to the specific permit. There is no suggestion in the Act's NSR provisions that EPA has authority to second-guess the states on matters that are a lawful and rational exercise of discretion properly conferred upon the state. Second, and conversely, EPA is the agency with primary responsibility to interpret the federal law. In so doing,

[1] Parts C and D were added to the Clean Air Act by the Clean Air Act Amendments of 1977. In addition, the 1977 Amendments revised section 110(a)(2)(D) to require a rudimentary review of any new source or modification without regard to size. This so-called general or minor NSR program was revised again and recodified as section 110(a)(2)(C) by the 1000 Amendments. It is implemented by EPA regulations at 40 CFR 51-160-164 and the SID of the various states.

EPA acts to ensure that the state exercises its discretion within the bounds of the law and otherwise acts in accordance with applicable statutory and regulatory norms. In carrying out these principles, it is apparent that EPA acts largely as a guarantor that the state follow applicable procedures and not act arbitrarily or violate any objective standards that may apply, while the state remains free to exercise informed judgment in making the determinations. *See* Conference Report on Clean Air Amendments of 1977, H.R. Rep. No. 95-564, 95th Cong., 1st Sess., *reprinted in* 3 *Legislative History of the Clean Air Act Amendments of 1977* (*Legislative History*) 533 ("The Administrator shall issue orders and seek other action to prevent the issuance of an improper permit."); Senate Report No. 95-127, p. 31, 36 (1977), *reprinted in* 3 *Legislative History* 1405, 1410 ("The decision regarding the actual implementation of best available technology is a key one, and the committee places this responsibility with the State, to be determined in a case-by-case judgment." (p. 1405), and "The committee intends a sharply restricted role for the (EPA) in regard to implementing the policy to prevent significant deterioration. EPA is limited to ... seeking injunctive relief or other measures that would be necessary to prevent the issuing of a permit for a new source if it does not comply with the requirements of the subsection." (p. 1410)).[2]

[2] The Legislative History specifically discussed the permit program for PSD. There is no reason to believe that the discussion is not also fully applicable to the NSR permit program in nonattainment areas enacted at the same time.

In implementing these principles, EPA must strike a balance between infringing on state discretion, and preventing or remedying unlawful permits. For example, EPA is authorized to inquire into whether the state violated applicable procedures or acted arbitrarily in reaching its decision on lowest achievable emission rate (LAER) under section 173(2), such as by ignoring SIP limits in other states that are more stringent than the limits reflected in the permit in question. On the other hand, in the case of a decision applying best available control technology (BACT) under section 166(a)(4) for PSD, if a state has met all procedural norms, considered all available control technologies, and given a reasoned justification of the basis for its decision, EPA has no grounds on which to challenge a final substantive state decision that does not violate such objective standards. These principles and the demarcations of EPA's enforcement authority have been set out in EPA's approval of state PSD programs, *see, e. g.*, 57 Fed. Reg. 28093, 28095 (1992) and in enforcement guidance, *Memorandum*, "Procedures for EPA to address Deficient New Source Permits Under the Clean Air Act," from Michael S. Alushin, Associate Enforcement Counsel for Air, and John S. Seitz, Director, Stationary Sources Compliance Division (July 15, 1988) ("Deficient Permit Guidance").

II. Applicability of Section 113(a)(5) to New Source Review.

A. The 1977 Act.

Section 113(a)(5), as enacted in 1977, provided:

> Whenever, on the basis of information available to him, *the Administrator finds that a State is not acting in compliance with any requirement of* the

regulation referred to in section 129(a)(1) of the Clean Air Act Amendments of 1977 (relating to certain interpretative regulations) or *any plan provisions required under section 7410(a)(2)(I) of this title and part D* of this subchapter . . . *he may issue an order prohibiting the construction or modification of any major stationary source in any area to which such provisions apply or he may bring a civil action under subsection (b)(5) of this section*. (Emphasis added).

Under section 113(a)(5) as it appeared in the 1977 Amendments, the 95th Congress authorized EPA both to issue general construction bans or to take enforcement action regarding a specific source when EPA has made a finding that the state is not acting in compliance with any requirements under Part D with respect to the construction or modification of a major stationary source. EPA's construction ban authority under § 113(a)(5) is not, however, the focus of this memorandum. But *See, e.g.*, 44 Fed. Reg. 20372, 20380 (1979) (general preamble for approval of SIPs under 1977 Amendments); 57 Fed. Reg. 13498, 13552, 13555-56 (general preamble for approval of SIPs under 1990 Amendments) (section 113(a)(5) now authorizes construction bans in attainment as well as nonattainment areas).

EPA has also interpreted section 113(a)(5) to permit action against a source to prevent construction or modification pursuant to a specific state-approved NSR permit that, while arguably valid on its face, EPA has found to be deficient in meeting the applicable statutory or regulatory requirements.

Before the 1990 Amendments, EPA could challenge deficient state-issued PSD permits in attainment areas

under §§ 113(a)(1), 113(b)(1) or 167 but not under section 113(a)(5). The scope of EPA's PSD enforcement authority under the 1977 amendments is addressed in only one reported decision, *United States v. Solar Turbines*, 732 F.Supp. 535 (M.D. Pa. 1989). In that case, the court held that sections 113(a)(1), (b)(1) and 167: did not authorize EPA enforcement action solely against a source when the source had been issued a state permit under Part C allowing the construction or modification, unless the source had violated "objective standards."

Instead, the court found that EPA would have to take action against the state where the source itself had violated no "objective standards." *See, id.* at 539-40. According to the court, action against the state to remedy permit deficiencies could be taken under section 167, or in an enforcement action arising under section 113(a)(1), or, in a nonattainment area, under section 113(a)(5). *Id.* at 537, 539-40 (citing *United States v. Ohio Department of Highway Safety*, 635 F.2d 1195, 1203 (6th Cir. 1980)).[3] The court did not discuss whether enforcement action could be brought against both the state and the source for a violation of the provisions. EPA has stated, with respect to that decision, that if a state-issued permit does not conform to the Act's PSD requirements, EPA will decide "whether to sue the state and/or the source." 55 Fed. Reg. 23547, 23548

[3] The Sixth Circuit held that a state is subject to the enforcement procedures of section 113(a)(1) as a "person" under the Act when the state fails to perform a duty reasonably required of the state under the implementation plan. In that case, the state failed to deny registration to motor vehicles that did not pass inspection and maintenance omission tests, as required in the federally-promulgated provisions of the implementation plan.

(June 11, 1990) (notice of clarification regarding approval of Kentucky's PSD program).

B. The 1990 Amendments.

The 1990 Amendments to section 113(a)(5) (Pub L. 101-549, section 701) have given EPA enforcement authority with respect to all new source review requirements; not solely those under Part D and related provisions that are applicable only in designated nonattainment areas. The revised language also refers to a finding of noncompliance with "any requirement or prohibition of the Act" relating to the construction or modification of new sources, rather than with only a "plan provision" or other specified provisions of the Act.

Section 113(a)(5) now provides:

> Whenever, on the basis of *any* available information, the Administrator finds that a State is not acting in compliance with any requirement *or prohibition of the Act relating to the construction of new sources* or *the modification of existing sources, the Administrator* may –
>
> (*A*) issue an order prohibiting the construction or modification of any major stationary source in *an* area to which such *requirement* applies;
>
> (*B*) *issue an administration penalty order in accordance with subsection (d), or*
>
> (*C*) bring a civil action under subsection (b).
> (Emphasis added to indicate new language.)

Judicial action to enforce section 113(a)(5) continues to be authorized, as was the case under the 1977 Amendments, pursuant to subsection (b)(3), as follows:

> The Administrator shall, as appropriate, in the case of any person that is the owner or operator of . . . a major emitting facility, or a major stationary source . . . commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both, . . .
>
> (3) Whenever such person attempts to construct or modify a major source in any area with respect to which a finding under subsection (a)(5) has been made.

By replacing the specific references to noncompliance with section 129 (relating to the emissions offset interpretative ruling in 40 CFR Part 51, Appendix S) and SIPs under Part D in section 113(a)(5), as enacted in 1977, with references in the 1990 Amendments to noncompliance with new source review requirements generally, Congress has provided EPA with authority to prevent construction and modification of major sources in both attainment and nonattainment areas based on a finding of a state failure to comply with either statutory or regulatory requirements.

The legislative history of the 1990 Amendments makes clear that the amended provisions of section 113(a)(5) were intended to apply to new source review for PSD in attainment areas under Part C, as well as to NSR in nonattainment areas under Part D. The House bill specifically referred to findings of noncompliance – "with any requirement of Part C or Part D." H.R. 3030. Section 601. The House Committee Report also states with respect to the provision that became section 113(a)(5):

> *Failure to comply with Part C or Part D of title I* – This paragraph of subsection (a) authorizes enforcement actions where a State is not acting in compliance with any requirement of Part C or Part D of Title I. H.R. Rept. No. 101-490, Pt. 1, P. 391.[4]

The extension of the 1990 Amendments to include PSD permits in attainment areas within the scope of section 113(a)(5) makes EPA enforcement action against these source [sic] appropriate to the same extent as is the case when EPA finds that a state is not acting in compliance with any requirements or prohibition of the Act governing new sources in nonattainment areas. The court in *Solar Turbines* recognized that EPA had enforcement authority to take action against a source in a nonattainment area when a finding had been made under section 113(a)(5). The court stated that EPA may take enforcement action "when after a finding has been made that a State is not acting in compliance with the Act's *non* attainment [sic] provisions, an owner/operator persists in

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[4] In discussing the related enforcement provisions in section 113(b) of the final bill, Senators Chafee and Baucus, two of the Senate Conference managers stated:

> The agreement also adopts the House language making clear that [enforcement actions] can also be brought whenever an owner or operator is attempting to construct or modify a major stationary source in violation of new source requirements. 136 Cong. Record S 16950 (Oct. 27, 1990).

Thus, these Senate Conference managers agreed with the House Committee Report that enforcement actions could be brought against a specific source whenever a finding under subsection (a)(5) has been made with respect to any new source requirement. There is no contrary legislative history.

attempting to construct in violation of that finding." 732 F. Supp. at 537 (emphasis in original).

Like the court in *Solar Turbines*, EPA has interpreted section 113(a)(5), as enacted in 1977, to permit enforcement action against a source with a state-issued permit based on a finding of state failure to comply with the applicable nonattainment requirements.

The 1990 Amendments strengths EPA's position. As noted above, section 113(a)(5) as revised clarifies that enforcement action may be based on a finding of state failure to comply with "any requirement or prohibition" of the Act relating to new sources, and not only failure to comply with "plan provisions" or the offset Ruling in 40 CFR Part 51, Appendix S. Congress has thus clarified that a state failure to conform to the underlying statutory requirements regarding new source review, as well as state noncompliance with the terms of a SIP implementing those requirements, may provide a basis for action under section 113(a)(5). This revision reaffirms that the underlying congressional concern is that new sources be constructed in compliance with the statutory requirements, and not solely that the source comply with the SIP plan provisions as interpreted and applied by the state. Thus, where a state fails to submit timely SIP revisions under the 1990 Amendments, EPA may use section 113(a)(5) to insure that new source permitting by the state conforms to the amended statutory requirements during the period prior to adopting of revised implementation plan [sic]. *See* 57 Fed. Reg. 13555-56.

III. Proper Parties in Actions Based on Section 113(a)(5) Findings.

As discussed below, the statute is clear that EPA may maintain enforcement proceedings against a source under section 113(a)(5). The statute does not require that the state be joined as a party in such proceedings. This is the position EPA has taken in the past. Deficient Permit Guidelines, *supra*, p. 8.

The 1990 Amendments do not contain any new provisions bearing on the proper parties. Section 113(a)(5) and the related enforcement provisions, as found in both the 1977 and 1990 Amendments, on their face contemplate the enforcement action being brought against the source.

> *"[t]he Administrator shall in the case of any person which is the owner of an affected major source . . . and may, in the case of any other person, commence a civil action . . .*
>
> (3) *Whenever such person* . . . attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) has been made. (Emphasis added.)

This language leaves the Agency with discretion whether to join the state as a party in an enforcement action against a source based on a finding of a state failure to comply. As noted above, enforcement action against the state has been found to be permissible under other provisions of Title I. *United States v. Ohio Department of Highway Safety, supra; see also Solar Turbines,* 732 F. Supp. at 540. Although the statute plainly allows EPA to proceed against a source as sole defendant as a matter of law, it would be prudent to join the state as well in most

cases. This will prevent sources from asserting as an equitable defense that EPA has failed to join a state that is the "responsible" party because it issued the allegedly deficient permit at issue.

The 1990 amendments do not specify how the Administrator's finding of noncompliance by a state is to be made. EPA's Deficient Permit Guidelines provide a model Finding of Violation to the state. The model Finding of Violation gives the basis for the finding of noncompliance, and a copy is provided to the state and the source. Deficient Permit Guidance, Appendix 3. The document states that it serves to provide an opportunity to confer with EPA prior to initiation of civil action, but without any waiver of EPA's right to commence action immediately. Under the EPA Deficient Permit Guidelines, section V. B., EPA is to "keep the source informed of all EPA's attempts to convince the permitting agency to change the permit." This policy is important as a matter of equity in providing assurance that the source is on notice of EPA's position before any non-complying permit is issued.

IV. Action Against Operating Sources.

The Office of Enforcement seeks advice on whether enforcement action to implement section 113(a)(5) is limited to sources that are being, or may soon be, constructed or modified, or whether action may also be taken with respect to a source already in operation. Section 113(a)(5) states that the Administrator may "issue an order prohibiting the construction or modification" of any source. The related enforcement provisions in section 113(b)(3), and (d)(1)(C), authorize action when a person "attempts to construct or modify a major stationary source." These

provisions are focused on construction in progress or in the future, and might be read to exclude enforcement against sources that have already begun operation.

The better reading of section 113(a)(5) – and certainly a reasonable one – is that EPA is not precluded from taking enforcement action simply because the source has been able to commence construction, and even operation, before EPA has had a chance to discover the violation and act upon it. This interpretation is supported by the legislative history of the 1990 Amendments.[5] Likewise, judicial enforcement action and administrative penalties are not barred if, following EPA's comments during a state-permitting proceeding or issuance of a Notice of Violation or administrative order, a source manages to complete construction or modification and begin operation prior to

[5] The Senate bill expressly provided for enforcement against the operation of a non-complying source. S. 1630, section 601(g). This provision was not included in the final 1990 Amendments, apparently because the agency was found to already have appropriate authority. Senators Baucus and Chafee, two of the Senate Conference managers, stated their view that the intent of the conference agreement was to:

> preserve the current interpretation of the EPA that it can prohibit the operation of a source upon *discovery* that such source is operating in violation of new source requirements. Indeed, it is particularly important that the EPA be allowed to take enforcement action against operating sources that have circumvented new source review requirements. . . .
>
> We note that EPA has been judicious in the use of this authority to date, and we would encourage the Agency to continue to exercise its discretion with some restraint in this area. 136 Cong. Record, S. 16951 (Oct. 27, 1990) (emphasis added).

the filing of a civil action or commencement of an administrative penalty proceeding. EPA's existing guidelines urge the Agency to act promptly upon the discovery of noncompliance, and EPA has interpreted the provisions as allowing enforcement action even if operations have started. *See* Deficient Permit Guidelines, pp. 1, 2 and 4.

Given the underlying statutory purposes, this guidance is proper. Section 113(a)(5) and the related provisions of section 113(a)(1), (b)(1), (b)(3) and section 167 are plainly intended to grant EPA adequate enforcement authority to ensure that new or modified, major stationary sources follow the new source review requirements of the Act. That statutory purpose would be undermined if new or modified sources were insulated from compliance with the statutory requirements merely because EPA did not discover and fully act upon such noncompliance prior to the beginning of operations at the new or modified source. Moreover, beginning operations does not cure the ongoing violation of the underlying provisions of the Act and applicable regulations and SIPs. That is, it does not change the fact that the new source or modification was constructed without a permit that conforms to the requirements of the Act. As discussed above, those provisions obligate states to issue, and sources to construct in accordance with, new source review permits that conform to the substantive and procedural requirements of the new source review program. It is worth noting, however, that upon issuance of a facially valid permit, substantial

equities begin building on behalf of the holder of that permit. Deficient Permit Guidance at 2.[6]

[6] Many of the issues discussed in this memorandum were addressed in a recent district court decision, *United States v. AM General Corp.*, Civ. No. S87-00377 (N.D. Ind.), slip op. Dec. 14, 1992. In that case, the court upheld EPA's position on several points, but granted summary judgment for the defendant based upon the timing of EPA's claim. *AM General* involved an EPA finding that a major stationary source had violated the Clean Air Act by modifying its operations based upon a facially valid Part D permit issued by the state that did not conform to the Act's NSR requirements. First, the court properly found that mere possession of a facially valid permit does not shield the source from enforcement action and that EPA has authority to bring an enforcement case under section 113 without exhausting state administrative or judicial remedies when a state issues a permit that fails to conform to the Act's requirements. *AM General*, slip op. at 15-16, 23. The court also found, however, that in order to maintain such an action, EPA must as a matter of law, issue a finding of violation to the state alleging permit deficiencies *before* the source constructs or modifies in reliance on the state permit. *Id.* at 24-25. EPA believes this decision was erroneous in certain key respects and has filed a motion for reconsideration, which is pending. Regardless of the final outcome, however, *AM General* suggests that EPA may want to reconsider aspects of its NSR enforcement policy, as the case underscores a pattern of judicial misunderstanding of those policies. The staff of the Office of General Counsel would be happy to assist in any such effort.